



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

February 21, 2019

L. Francis Cissna
Director
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

Re: Request to Delay the March 11, 2019 Effective Date of Revised Form I-539, Application to Extend/Change Nonimmigrant Status, and new Form I-539A, Supplemental Information for Application to Extend/Change Nonimmigrant Status and Suspend the Mandatory Biometrics Requirement

Dear Director Cissna:

By this letter, and for the reasons outlined below, we respectfully request that USCIS delay the March 11, 2019 mandatory effective date of revised Form I-539 and new Form I-539A and adopt a 90-day grace period until June 9, 2019 to continue to accept the current version of Form I-539 and Supplement A (12/23/16 edition). Introducing a revised Form I-539 and new Form I-539A without any type of transition period is contrary to long-standing agency practice, will significantly impact the orderly, fair, and efficient progression to the new form, and could result in significant harm to I-539 applicants who are unaware of this abrupt form change. In addition, as discussed below, AILA respectfully requests that USCIS suspend the mandatory biometric appointment requirement, and corresponding biometric fee, for all I-539 applicants until the regulated public has had a meaningful opportunity to comment on this new requirement.

By way of background, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our more than 15,000 members practice and teach immigration law both in the United States as well as overseas.

On February 11, 2019, USCIS [announced](#) that it would publish a revised version of Form I-539, Application to Extend/Change Nonimmigrant Status, and a new Form I-539A, Supplemental Information for Application to Extend/Change Nonimmigrant Status, to the USCIS website on March 11, 2019. USCIS also stated that starting on March 11, 2019, it will only accept the revised version of the form and that prior versions will be rejected on that date. The revised version of this form involves at least two significant changes. First, it includes a new signature requirement for

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all applicants, including minor children, which the form did not require before. Second, it adds a mandatory biometrics requirement for all applicants, including minor children, as well as a \$85 biometric services fee.

Form I-539 is used by a wide variety of nonimmigrant foreign nationals to apply for a change or extension of nonimmigrant status. Such applicants include undergraduate and graduate college and university students, diplomatic officials and their families, business visitors and tourists, representatives of foreign media, cultural and educational exchange visitors, and the spouses and children of temporary workers, multinationals managers and executives, artists and entertainers of extraordinary ability and religious workers.

Historically, when introducing new or revised versions of forms, USCIS has established a reasonable transition period during which time it has accepted prior form versions. Such transition periods ensure that the regulated public is given adequate notice of any form changes, and allow for an orderly, fair, and efficient progression to the new form. Such transition periods have been particularly beneficial to individuals who are not represented by an attorney, as pro se applicants typically have less access to information regarding form revisions and procedural updates. As you are aware, an individual whose application for change or extension of status is rejected by USCIS for failing to pay the proper filing fee or submit the correct form runs the risk of falling out of status, accruing unlawful presence towards the 3-year and 10-year bars, and being subject to removal proceedings. As USCIS often takes several weeks to return a rejected application to an applicant, this abrupt form change and new biometric fee requirement could result in irreparable harm to an individual's future eligibility for immigration benefits in the United States.

Moreover, on April 1, 2019, USCIS will receive hundreds of thousands of H-1B cap-subject petitions for the FY2020 H-1B cap season. Many of these H-1B petitions will be accompanied by Form I-539 applications for family members. Inevitably, given the high volume of H-1B petitions prepared in advance for the forthcoming H-1B cap season, some of these I-539 applications will have been prepared prior to March 11, 2019, and thus, will have utilized the most recent version of Form I-539 and Supplement A (12/23/16 edition). These accompanying family members whose Forms I-539 are rejected for inadvertently failing to utilize the revised version of the form could fall out of status, resulting in significant prejudice to the applicants. Moreover, if an H-1B petitioner submits one filing fee check for both the I-129 petition and the I-539 application, a rejection of the I-539 application by USCIS for failure to utilize the revised version of the form or failure to include the new \$85 biometric fee, could result in the loss of a coveted H-1B number to a qualified beneficiary.

Establishing a reasonable transition period when introducing a new or revised version of a USCIS form is long-standing agency practice and policy. There is no compelling legal or policy reason for USCIS to fail to provide a reasonable transition period in this case. The need for a reasonable transition period is greater here when USCIS is imposing new, substantive requirements on the

regulated public, such as the implementation of a biometrics fee for each applicant as well as a mandatory biometrics requirement. The agency has not offered any rational basis for the unprecedented policy of requiring biometrics for all I-539 applicants, including those under 14 years of age, as well as children as young as infants, nor has it provided the public with a meaningful opportunity to provide comments on this requirement. Although USCIS provided the public with a 60-day notice and comment period on proposed revisions to Form I-539 and its instructions in February 2018¹, USCIS was not transparent during the notice and comment period that a biometrics services appointment would be mandatory for all applicants utilizing Form I-539, including all individuals listed on Supplement A, including those under 14 years of age. To the contrary, USCIS indicated in the proposed changes to the Form I-539 Instructions that “USCIS **may** require that you appear for an interview or provide biometrics (fingerprints, photograph, and/or signature) at any time to verify your identity, obtain additional information, and conduct background and security checks” (emphasis added). By utilizing the word “may require” in lieu of the words “will require” in the proposed changes to the I-539 Form instructions, the public was not given meaningful notice that USCIS would require biometric services appointments for all applicants utilizing Form I-539, all those utilizing Supplement A, including those under 14 years of age. In fact, the agency was silent during the notice and comment period with respect to whether the biometrics service appointment requirement would apply to applicants utilizing the Supplement A form.² AILA highlighted this lack of clarity in its comment to the agency, noting that “It is not clear from the form instructions, however, whether I-539 applicants may be required, or will be required to provide biometrics.”³ Other members of the public also found the proposed changes to Form I-539 relating to biometrics either unclear or contradictory.⁴ If USCIS intended for biometrics to be mandatory for all I-539 applicants, including all applicants listed on Supplement A, as well as minor children and infants, the agency should have made such a proposal clear during the relevant notice and comment period in order to allow the regulated public a meaningful opportunity to comment on such a requirement. Notably, a copy of the proposed new Form I-539A was **not** provided to the public during the notice and comment period.⁵ Only the instructions to Form I-539A were made available to the public for comment, and those instructions

¹ 83 Fed. Reg. 6874 (Feb. 15, 2018).

² See Instructions for Supplement A to Form I-539 2.09.2018, <https://www.regulations.gov/document?D=USCIS-2007-0038-0071>, and Application to Extend/Change Nonimmigrant Status 2.09.2018, <https://www.regulations.gov/document?D=USCIS-2007-0038-0069> (failing to indicate that Supplement A applicants would be required to attend a biometric services appointment).

³ AILA Submits Comments on Proposed Revisions to Form I-539, April 6, 2018, <https://www.aila.org/infonet/aila-submits-comment-proposed-revisions-form-i-539>.

⁴ Anonymous comment submitted February 23, 2018 noting that “Can you please clarify on page 4 of the Form I-539, do the proposed changes to require biometrics or appointments for all I-539 applicants?” <https://www.regulations.gov/document?D=USCIS-2007-0038-0072>; see also Comment Submitted by David Zaret, Indiana University, <https://www.regulations.gov/document?D=USCIS-2007-0038-0083>; Comment Submitted by Laurie Cox, Ball State University, <https://www.regulations.gov/document?D=USCIS-2007-0038-0079>.

⁵ See Agency Information Collection Activities: Form I-539, Revision of an Existing Information Collection; Comment Request, Docket ID: USCIS-2007-0038, <https://www.regulations.gov/docket?D=USCIS-2007-0038>.

were silent on a mandatory biometrics services requirement, thus leaving the regulated public unaware that USCIS would institute a mandatory biometrics requirement for all applicants, including those completing new Form I-539A.

Accordingly, AILA respectfully requests that USCIS delay the implementation of the mandatory biometrics requirement until the regulated public has had an opportunity to understand and address concerns with the broad application of this requirement. Clearly, there is no emergency that necessitates taking biometrics for all applicants who are applying for a change or extension of nonimmigrant status that cannot be phased in over a reasonable period of time. On the contrary, as outlined above, there are strong policy reasons for USCIS to institute a reasonable transition period when introducing the revised version of Form I-539 and new I-539A form. Moreover, rejecting and returning applications which inadvertently fail to include the revised version of Form I-539 and new I-539A Form and applicable biometrics fees will utilize limited agency resources and slow overall agency processing of these applications. For all of these reasons, we respectfully request that the mandatory effective date of the revised Form I-539 and new I-539A form be delayed until June 9, 2019, and that USCIS suspend the mandatory biometric appointment requirement, and corresponding biometric fee, for all I-539 applicants until the regulated public has had a meaningful opportunity to comment on this new requirement.

We thank you for your consideration of this request and look forward to hearing from you soon. Should you have any questions, please do not hesitate to contact Diane Rish, Associate Director of Government Relations at (202) 507-7642 or drish@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

cc: Ms. Tracy Renaud, Acting Deputy Director, USCIS
Ms. Lora Ries, Chief of Staff, USCIS
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